(3)

SUPREME COURT, U.S.
FILED
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NO. 93 - 1441

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RICHARD M. WALSH,

PETITIONER,

v.

STATE OF DELAWARE,
MICHAEL N. CASTLE AND THE
DEPARTMENT OF MILITARY
AFFAIRS,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REFUTATION OF REASON FOR DENYING PETITION

1. Contrary to Respondents' "Reason for Denying the Petition" (Res.' Brief in Opp. at 7) and Respondents' statement (at 8, last para.) that "By his petition Walsh asks this Court to create a federal rule to change the limitation periods for judicial actions --," a statement for which there is no basis in record or in fact, Walsh neither seeks nor asks this Court to create any such rule. Rather, Walsh asks only that this Court require that the already existing exhaustion policy of the U.S. Court of Appeals for the Third Circuit be adhered to and applied in the present case in a manner consistent with its definition and its application in previous Third Circuit cases. (see Pet. for Cert. at 25-31).

a. Respondents' only "Reason for Denying the Petition" clearly deviates from any factual basis by its very premise of likening Jorden to Walsh (Res.' Brief in

Opp. at 8). In doing so, Respondents incorrectly likened a full-time Guard employee in a civilian technician program under state control (Jorden) to a part-time citizen-soldier under no such state controlled program (Walsh) and therefore simply, but incorrectly, concluded that, since Jorden was not required to exhaust federal administrative remedies, Walsh would likewise not be required to do so, based on Jorden v. National Guard Bureau, 799 F.2nd 99, 102 n. 5 (3rd Cir. 1986), cert. denied, 484 U.S. 815 (1987).

b. It is apparent from Karr v. Carper, U.S. Dist. Court, Dist. of Delaware, CA 88-466 MMS, Unreported Opinion (31 March 1993), that both the Res.' above analogy and conclusion are incorrect because the Delaware Department of Justice (DE/DOJ), which represents both the Defendants in the Karr case and the Respondents in the present case, is out of sync with the current Third

Circuit exhaustion policy (see Pet. for Cert. at 25-27, para. (1)-(1)(c)).

(1) This is clearly demonstrated by DE/DOJ's recent flip-flop in its position on the exhaustion issue (to the wrong side each time) from that of exhaustion being required in the Karr case, in which the Dist. Court ruled against DE/DOJ (see Pet. at 27-29, para. (1) with Note), to that of exhaustion not being required in the present case, in which the lower Courts should have again ruled against DE/DOJ in accordance with the Third Circuit's own exhaustion policy because the "overriding characteristic of state control" was reversed between those two cases from being present in Karr, as it was in Jorden where the court ruling was therefore consistent with Karr, to being absent in the present case (see Pet. at 29-31, para. (b),(c) with Note); thus, making the DE/DOJ's flip-flopped position of exhaustion not being

required in the present case once again out of sync with Third Circuit law and therefore incorrect.

c. DE/DOJ's flip-flopped and out of sync positions on exhaustion in Karr and Walsh are apparently due either to opposite defense strategy requirements in each case or to an error of apprehension regarding the critical importance either the absence or presence of "state control" plays in first determining the "adequacy of the remedy the (federal) administrative process could potentially supply" which in turn determines whether or not exhaustion is required under current Third Circuit law (see Pet. at 15-17, para. 9. a., b., c.).

BENCH MARK ESTABLISHING EXHAUSTION DATE OF 3 DECEMBER 1990

2. Regarding Res.' Brief in Opp. at 4, para. 7; at 10, last 2 sentences: Respondents stated incorrectly that the est. Nov 90 ABCMR correspondence "reported that Walsh's

initial request for review was denied in 1983 and that his later applications to reopen were also rejected over the ensuing years," and therefore concluded incorrectly (at 11) that Walsh had in effect also been notified each time that he had exhausted the Army's administrative appeals system.

a. Contrary to Respondents' statement, however, two applications to reopen were approved for reconsideration by the ABCMR based on new evidence of wrongdoing and cover-up within the Dept. of the Army (DA). A 12 Mar 86 letter from the ABCMR to Walsh with a copy to Senator Biden (App. A) shows that the second of the two took place in 1986 (the first in 1984) and officially notified Walsh and Biden of the Board's decision not to reverse and the grounds for it; but, again contrary to Respondents' contention, there was no notice, no mention at all of having exhausted the Army's administrative appeals system and none

subsequently until the undated (est. Nov 90) ABCMR letter received by Walsh under Senator Biden's 3 Dec 90 advisory letter, see below.

(1) Other requests for reconsideration were subsequently filed based on false evidence having been found in the ABCMR's 1986 Memorandum of Consideration on which the Board's denial was based, but were stonewalled by the staff of the Board. An appeal was then made on 10 Jun 88 to the Secretary of the Army on Walsh's behalf by Senator Roth (during Senator Biden's long recovery from a cerebral aneurysm) which was never answered directly but instead, after long delays and several follow-ups, was apparently routed back to the ABCMR where it, along with Senator Biden's 26 Sep 90 letter, were simply disposed of by the 3 Dec 90 exhaustion notice to Walsh (see para. b. below) without the ABCMR or its staff ever checking and verifying the new evidence of DA cover-up which Senator Biden had

requested, or even attempting to refute the allegations of DAIG and ABCMR use of false evidence to cover-up the alleged wrongdoing as had been specifically requested in Senator Roth's 10 June 1988 letter (please see Compl. para. 80; App. B; App. C-2, 3, CF VI, VII).

b. Pursuant to the undated (est Nov 90) ABCMR letter (Res.' Brief in Opp., App. F), Senator Biden, in his 3 Dec 90 letter (App. D), enclosed a copy of the ABCMR letter which stated, at F-2, last para:

> "Mr. Walsh should be advised that he has exhausted his opportunity for relief within the Army's administrative appeals system. His only recourse now (Nov 90) is in a federal court of competent jurisdiction." Senator Biden's letter then advised Walsh that, "At this point (3 Dec 90), the only way to pursue your corrections of military records is through a Federal Court."

(1) Recognizing that he too was being put on notice for the first time in this matter, Senator Biden further advised Walsh as follows:

> "Under separation of powers, I am not permitted to become involved in matters of the court. If you have further questions about other matters pertaining to the federal government, please do not hesitate to contact my office."

d. Finally, Senator Biden has been addressee on or sent a copy of all ABCMR correspondence in this matter and, as demonstrated in his 3 Dec 90 letter to Walsh (para. (1) above), would have notified Walsh of the separation of powers restriction on him and therefore distanced himself from Walsh regarding any further contacts on this matter had there been an earlier notification of exhaustion. Therefore, Senator Biden's 3 Dec 90 letter to Walsh is the true and accurate bench mark for when Walsh's opportunity for relief within the Army's administrative appeals system was in fact officially exhausted.

REFUTATION OF ADEA CLAIM CHALLENGE

3. Regarding Res.' Brief in Opp. at 12-13:

a. Respondents' ADEA "theory" at 12 is

invalid because it is based on two incorrect statements.

(1) Contrary to Respondents' statement, Walsh actually complained that Governor Castle and key advisors (Chief of Staff, Legal Counsel and new Adjutant General) had willfully violated the ADEA (Compl. para. 91) when, responding for Governor Castle to Walsh's 6 Mar 89 and 4 May 89 follow-up letters to the Governor, AG Episcopo's 23 May 89 letter falsely stated that every avenue available for Walsh's reinstatement had been exhausted and that there is nothing further that "can" be done, which the Governor and his advisors knew was not true from Walsh's 6 Mar 89 and subsequent letters, wherein Castle had been advised of the availability of a Federal waiver obtainable through the Office of Senator Roth. Instead, however, Governor Castle's later refusal to simply request the Federal waiver when Senator Roth inquired

about it on Walsh's behalf only further confirms that violation of the ADEA was willful. (see Appellant's Reply Brief, No. 93-7421, pgs. 6-8, para. 2.c.; Compl. para. 91-98).

(2) Again contrary to Respondents' statement, except for Governor Castle having prolonged the cover-up of the 1982 wrongdoing, Walsh claimed no tie between his improper termination in 1982 and Governor Castle's ultimate failure to request an age waiver in 1989, the latter being clearly distinguished as a separate event in Walsh's Cause of Action 6 at Complaint page 6; whereas, Walsh's actual ADEA claim is that, because Governor Castle entrapped himself in the cover-up of his predecessor's alleged wrongdoing (Compl. para. 74) and knew that the "Blue Book" documentation irrefutably substantiating the 1982 alleged wrongdoing and its subsequent

cover-up would be a serious political embarrassment to himself during the Federal Recognition Board hearing necessary to re-instate Walsh (Compl. para. 61, 70, 71; App. C), Castle proceeded ostensibly to review but actually to drag-out an unnecessary re-review of the "Blue Book" (Compl. para. 63, 75, 81 - 83) until Walsh's 59th birthday on 6 Oct 88 so that when pressed later by Walsh for reinstatement (Compl. para. 89, 90) he could simply announce that all avenues to accomplish Walsh's otherwise fully justified reinstatement had been exhausted and nothing further can be done because Walsh is now over 59 years of age (Compl. para. 91); whereas, neither statement was true and Governor Castle knew that. (see para. 3.a.(1) above).

b. Based on actual facts rather than Respondents' unfounded "theory," the above actions and deceit by the highest elected official in the State of Delaware for no

reason other than to avoid political embarrassment to himself, all of which Respondents' "theory" failed to recognize or even consider, can only be characterized as nothing less than willful age discrimination for purely personal and political purposes and, therefore, indeed "bespeaks the type of intentional or callous behavior" Respondents claim would be needed to trigger the three-year rather than two-year limitations period.

(1) Therefore, Walsh's claim that the alleged ADEA violation was willful fully meets the "correct standard" adopted by the U.S. Court of Appeals for the Third Circuit and affirmed by the U.S. Supreme Court in,

> McLaughlin v. Richland Shoe Co., 486 U.S. 128, "Summary" (1988), by which, "an employer's violation is not willful unless the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the Act."

(2) However, when the District Court applied the appropriate three year

statute of limitations to the period between the undisputed accrual date of 23 May 1989 and filing date of 22 May 1992, an arithmetic error was apparently made which caused the Court to incorrectly conclude that Walsh's willful age discrimination action "would still be time barred." (see Pet. for Cert. pgs. 32-34, para. 2.).

c. Finally, when Respondents stated that "most courts have held that Congress did not intend that ADEA reach to persons serving in the uniformed federal armed forces or in the state militias," they failed to also point out that it was done in the context of "bona fide military personnel actions," primarily under the attritive provisions of the Reserve Officer Personnel Act (as in the cases cited by Respondents) which are constitutional and which the ADEA therefore does not cover. Also,

> "The ADEA and Reserve Officer Personnel Act can be reconciled, and effect given to the language and (congression-

> al) intent of both, by construing the term 'personnel actions' as used in the ADEA, narrowly." (See Simpson v. United States, 467 F. Supp. 1122, 1128 (1979).

(1) In addition, the U.S. Court of Appeals for the Third Circuit has held,

> "If the military justification outweighs the infringement of the Plaintiff's individual freedom, we may hold for the military on the merits, but will not find the claim to be non-justiciable and therefore not cognizable by a court." Dillard v. Brown, 652 F.2nd 316, 323 (3rd Cir. 1981); Jorden v. National Guard Bureau, 799 F.2nd 99, 102 n. 5 (3rd Cir. 1986), cert. denied, 484 U.S. 815 (1987).

(2) It is clear from the nature of the present case that it involves absolutely no "bona fide military personnel actions," but rather, the willful violation by three elected or politically appointed State officials of statutes and regulations as well as the intent of Congress for personal and political purposes. (See Appellant's Reply Brief, pg 1, para. 1-2 (App. E), pgs. 2-8, para. a.- c.; Compl. para. 6-10, 49).

OTHER MISINFORMATION IN RESPONDENT'S BRIEF IN OPPOSITION

4. Contrary to Respondents' "Counter-Statement of the Case" (at 2-3, para. 3.) and substantiated by the evidence validated by then Governor Castle's legal staff (Compl. para. 61, 81-83; App C):

a. As Adjutant General, Lank was custodian of all Del. Nat. Guard personnel records and therefore had prior (not "later determined" as stated by Respondents) direct personal knowledge before selecting his long time friend and college fraternity brother, Colonel Trivits, for the "federally recognized" Deputy Commanding General position in the 261st Signal Command (DCG/261) that Trivits was "actually medically unacceptable for retention in the Army National Guard in accordance with regulations" which was later only "reaffirmed" to Lank by the National Guard Bureau. (Compl. para. 40-42: App C-1, 2, CF

III, IV).

b. The above act of "political cronyism" was actually achieved not by the aborted OER attempt to discredit Walsh, but rather by the deliberate manipulation of the regulated officer selection and promotion process and the willful violation of Federal and State statutes and regulations governing the promotion and discharge of National Guard officers which wrongfully and 9 years prematurely terminated his otherwise rising military career. (Compl. para. 23; para. 5.a. below; Compl. para. 15; App. C-2, CF V).

c. Governor duPont and Secretary of the Army Marsh had been given sufficient, unrefuted, substantiating evidence on which to find reason to grant the relief Walsh requested. However, duPont, in order to avoid political embarrassment, first refused to get involved and later provided false information on which to base his denial

(Compl. para. 30-31, 44-47, 51; App C-1, CF I); while the Army refused to grant requested relief based on later-proven false and misleading evidence in the Army's Report of Investigation as well as suppressed legitimate evidence withheld from the IG and the Army Vice Chief of Staff at the time they acted on this case. (Compl. para. 32, 49, 10.d; App C-2, CF VI, VIII).

5. Respondents' portrayal (at 2, para. 2 & n.1) of Walsh in August 1982 as an officer with more than three decades of service entrenched at the top in the rank of Colonel for almost a half-decade and therefore ripe for termination under one of the "myriad of statutes" Congress has enacted to prevent such a situation is greatly overdone and grossly misleading; whereas, in reality Walsh had just received on 8 April 1982 the positive results of his annual review by the Selective Retention Board with an enthusiastic and mission oriented

endorsement from his boss, the Commanding General of the 261st Signal Command (Compl. para. 24-25), the position two steps higher for which the record clearly showed Walsh to have been "best qualified" in accordance with and required by all governing statutes and regulations (Compl. para. 4, 15, 20, 24-25), and to which he therefore had the highest probability to succeed in 1987 (Compl. para. 67-68) as he also had to be promoted to the DCG/261 position in 1982 absent the improper Lank/Trivits cronyism and its resulting deliberate violation of those statutes and regulations (ROPA (para. a. below); 32 U.S.C. 307 (a)(2); Compl. para. 15, 40-43), as well as the clearly stated intent of Congress (Compl. para. 103).

a. Respondents' misleading portrayal of Walsh actually distorts the primary purpose of the Reserve Officer Personnel Act of 1954 which governs the promotion and

discharge of National Guard officers. Briefly, to ensure that military personnel meet proper standards through a system for merit promotion based on regular review of each officer's performance and qualifications and, by means of its attritive provisions, to provide adequate promotion opportunities for qualified officers. Simpson v. United States, 467 F. Supp. 1122, 1124 (1979). Pursuant to which, NGR 635-102 requires that a Selective Retention Board consider yearly whether or not each officer with 20 or more years of commissioned service should be retained in the National Guard based on a review of each officer's demonstrated performance and potential, latest medical examination, and other factors for assuring a viable combat ready military unit in future years. Navas v. Vales, 752 F.2d 765,767 (1985).

b. Respondents also failed to recognize the significance in the present

case of the above stated purpose and requirements under the ROPA and, therefore, also failed to consider (1) the simple question: How then, under such a law, was Walsh, the "best qualified" officer for promotion to the DCG/261 position, moved out instead of up; whereas, Trivits, both medically and professionally unqualified for the promotion and "actually medically unacceptable for retention in the Army National Guard in accordance with regulations" (Compl. para. 40, 43), was moved up instead of out ?? and (2) the logical and rational answer: Political cronyism!!

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons stated therein.

Date:

25 Aug 94

Respectfully submitted,

Richard M. Walsh

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APPENDIX

APPENDIX A-1

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
WASHINGTON, D.C. 20310-1803
12 MAR 1986

SFMR
WALSH, RICHARD M.
222-16-6699

Brigadier General Richard M. Walsh
Delaware Army National Guard (Retired)
2209 Pennington Drive
Wilmington, Delaware 19810

Dear General Walsh:

This is in reply to your request for reconsideration of your earlier applications for correction of military records.

Your request, the information you submitted, and your available records have been reconsidered by the Army Board for Correction of Military Records. It was determined that the new information and new contentions submitted in your request do not warrant a reversal of the Board's earlier decisions. Enclosed is a copy of the Memorandum of Consideration which explains why the Board reached this decision.

You are assured that this decision is the result of a thorough and impartial consideration of all the information available to the Board.

Sincerely

(s)

Karl Bielenberg
Executive Secretary

Enclosure
CF: Honorable Joseph R. Biden, Jr.

APPENDIX B-1

UNITED STATES SENATE
WILLIAM V. ROTH, JR.
WASHINGTON, D.C. 20510
JUNE 10, 1988

The Honorable John O. Marsh
Secretary of the Army
Pentagon, Room 3E718
Washington, D.C. 20310

Dear Mr. Secretary:

Enclosed is a copy of the March 30, 1988 letter to you from one of my constituents, Richard M. Walsh, requesting your personal attention and corrective action, to which he has not received a reply to date.

As stated in paragraph 3, it concerns two of the same problems, apparently still unresolved, that he had initially asked to be investigated and corrected back in June, 1982. At that time, I had assured him that his complaint would receive a fair hearing from appropriate Army officials, which I then requested of you in my July 16, 1982 letter, but which he contends was not done.

Instead, Mr. Walsh alleges in paragraph 5, that both the DAIG and the ABCMR covered up the initial problems by suppressing legitimate substantiating evidence and basing the conclusions of their respective reports of investigation on false evidence. He also contends that incontrovertible evidence of the coverups, obtained subsequently from the Department of the Army's own files through the Freedom of Information Act, was provided to both the DAIG and ABCMR, and finally to your office; but that it was never directly addressed, nor was it ever denied or refuted.

As you can see in paragraphs 14 and 15, Mr. Walsh presents the details of the two problems and their alleged coverups along with what he described as irrefutable substantiating evidence comprised of 18 Evidence Sheets consisting, with one exception (#10), of Department of the Army

reports, correspondence and publications.

I'm sure that you will agree that the allegations are very serious and are well documented, and that they must, therefore, be addressed directly and as quickly as possible in a fair hearing and impartial review of all the evidence presented. The documentation enclosed with the March 30, 1988 letter from General Walsh does appear to conclusively justify and fully warrant the corrective action he requests in paragraphs 2 and 18.

Therefore, if Mr. Walsh's allegations are incorrect then clear specific and legitimate refutation is warranted. I recommend and appreciate your attention at this critical juncture to see once and for all whether Mr. Walsh was given his fair shake.

Thank you for your cooperation.

Sincerely,

(s)
William V. Roth, Jr.
U.S. Senate

WVR:dmi

Attachments

APPENDIX C-1

NOVEMBER 1986
"BLUE BOOK"
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CASE FILES I-IX(ALLEGATIONS AND EXHIBITS OF IRREFUTABLE SUBSTANTIATING EVIDENCE):

CASE FILE I, EXHIBITS A - F: Failure of the CINC/DNG, Governor duPont, to exercise proper Command & Control or to heed, investigate or respond to allegations of resultant cronyism and misconduct by TAG/DNG, MG Lank; and the subsequent participation by Governor duPont in a Department of the Army cover-up.

CASE FILE II, EXHIBITS A - G: Misuse and mismanagement of State funds by TAG/DNG.

CASE FILE III, EXHIBITS A - E: Improper selection and appointment by MG Lank of his

crony, Colonel Trivits, to a technically demanding general officer line unit position for which he was not qualified.

CASE FILE IV, EXHIBIT A: Improper retention by MG Lank of Colonel Trivits in the DEARNG after his removal from the general officer position to which TAG had improperly appointed him.

CASE FILE V, EXHIBITS A - F: Improper manipulation and stalling of the regulated DNG Officer Selection and Appointment Process by TAG, MG Lank, in order to wrongfully terminate the DNG career of the preeminently qualified candidate for the technically demanding general officer line unit position and clear the way for the improper appointment of his unqualified crony, Colonel Trivits (see Case File III).

CASE FILE VI, EXHIBITS A - K: Misuse and mismanagement of Federal training funds by TAG/DNG and its subsequent cover-up by the

Office of the Inspector General, Department of the Army.

CASE FILE VII, EXHIBITS A - N: Falsification of official DEARNG personnel records by TAG's Assistant AG (with TAG's knowledge) and its subsequent cover-up by the Army Board for Correction of Military Records, Department of the Army.

CASE FILE VIII, EXHIBITS A - D: Incomplete and misleading report by TAG/DNG which concealed official Army Training Evaluators' confirmation of a very serious technical training deficiency in the DEARNG negatively impacting its mission-readiness.

CASE FILE IX, EXHIBITS A - G: Misleading, deceitful and fraudulent letters from the Office of the Secretary of the Army abetting the DA cover-up.

APPENDIX D

UNITED STATES SENATE
JOSEPH R. BIDEN, JR.
DELAWARE
WASHINGTON, D.C. 20510

DECEMBER 3, 1990

Mr. Richard Walsh
2209 Pennington Drive
Wilmington, DE 19810

Dear Mr. Walsh:

Thank you for your patience while awaiting a response to the inquiry that was submitted to the Department of the Army with regard to your efforts to have your military records corrected.

I regret that the Department of the Army could not render a favorable decision in this matter. I have enclosed for you a copy of the correspondence that was submitted to my office.

At this point, the only way to pursue your corrections of military records is through a Federal Court. Under separation of powers, I am not permitted to become involved in matters of the court.

If you have any further questions about

other matters pertaining to the federal government, please do not hesitate to contact my office.

Sincerely,

(s)
Joseph R. Biden, Jr.
United States Senator

APPENDIX E-1

[EXTRACT FROM REPLY BRIEF OF APPELLANT, PAGE 1]

NATURE OF THE CASE

1. Appellees incorrectly stated portions of the Nature of the Case at page 3. Appellant (Walsh) actually challenges three decisions not two; none of which was a bona fide military decision in nature nor served any constructive military purpose despite what describing them as "uniformed" attempts to infer.

2. To the contrary, each of the three challenged decisions was political and/or personal in nature and also are alleged to have been in violation of statutes and/or regulations. Each was made by an elected or politically appointed State Official clearly to serve only his own personal, not military, interests and purposes without any regard for the damaging consequences and greater wartime risks it imposed upon the many uniformed personnel directly and indirectly impacted, and upon the overall

military mission capabilities of the United States in which the Delaware Army National Guard (DEARNG) played a key role under the total force concept.